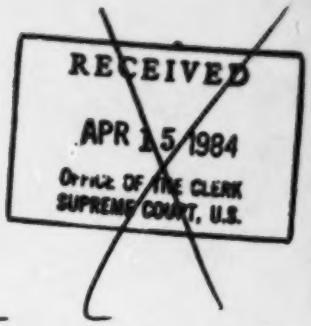
NO. 83-6589

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ORIGINAL



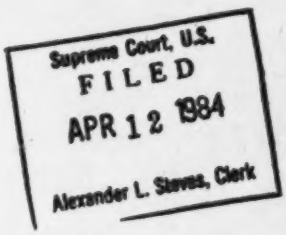
OLAN RANDLE ROBISON,

Petitioner,

-v-

STATE OF OKLAHOMA,

Respondent.



WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS
PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Can the State of Oklahoma, consistent with the Eighth and Fourteenth Amendments of the Constitution, employ statutory aggravating circumstances which, as interpreted by the Oklahoma Court of Criminal Appeals, do not significantly confine, channel or regularize capital sentencing discretion?

2. Can the State of Oklahoma use the aggravating circumstance that the petitioner "knowingly created a great risk of death to more than one person" in a manner that permits multiple punishments based on one set of facts?

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IN THE

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OLAN RANDLE ROBISON,

Petitioner,

-against-

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

To The Honorable, The Chief Justice, and Associate Justices of the United States Supreme Court:

Petitioner, Olan Randle Robison, prays that a writ of certiorari issue to review the decision of the Oklahoma Court of Criminal Appeals on January 13, 1984, affirming his convictions on appeal and sentences of death.

OPINION BELOW

The opinion of the Court of Criminal Appeals is designated for official publication, but has not appeared in the Pacific Reporter. It is set out at Appendix A.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on January 13, 1984, and an order extending until April 12, 1984 petitioner's time to file this petition for writ of

certiorari was entered on March 8, 1984 by the Honorable Byron R. White, Associate Justice of the United States Supreme Court (Apendix B). No date for petitioner's execution has been set. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves the Fifth Amendment to the Constitution which provides in pertinent part:

> "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

and the Eighth Amendment to the Constitution which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."

and the Fourteenth Amendment to the Constitution which provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law."

This case also involves the following Oklahoma statutes: 21 O.S. 1981 §701.7; 21 O.S. 1981 §701.9; 21 O.S. 1981 §701.10; 21 O.S. 1981 §701.11; 21 O.S. 1981 §701.12; 21 O.S. 1981 §701.13, which are set out at Appendix C.

STATEMENT OF THE CASE/1

Course of Proceedings

Petitioner and two others/2 were charged with three counts of murder in the first degree resulting from events that transpired on June 12, 1980. (R-1, p. 1-5) On March 27, 1981, Petitioner was convicted on all three counts by a McClain County District Court jury. (R-1, p. 13-14) On March 28, 1981, that same jury sentenced petitioner to death for each murder count. (R-1, pp. 15-19). Pursuant to 21 O.S. 1981 §701.12, the jury found the following aggravating circumstances present in all three killings: (1) that petitioner was previously convicted of a felony involving the use or threat of violence to the person; (2) that the petitioner knowingly created a great risk of death to more than one person; and (3) the existence of a probability that the petitioner would commit criminal acts of violence that would constitute a continuing threat to society. (Id). The jury found that as to victim Averil Bourque that her murder was especially heinous, atrocious or cruel, but that the murders of Julie Shelia Lovejoy and Robert Leon Swinford were not. (Id). The jury found that none of the murders were committed to prevent lawful arrest or prosecution. (Id.) On April 28, 1981, petitioner's motion for new trial was overruled, judgment and sentence was imposed, and a death warrant was signed. (Id). at 7-8, 9-10, 11-12).

1/ The record in the Court of Criminal Appeals consists of three bound transcript volumes (hereafter Tr.), and two bound copies of the pleadings (hereinafter R-1, R-2).

2/ Johnny Gillum was later tried and received sentences of life imprisonment. William Starr Jordan was allowed to enter negotiated pleas of guilty for life imprisonment.

On January 13, 1984, the Oklahoma Court of Criminal Appeals affirmed the judgment and sentences of the District Court. It also determined, as required by 21 O.S. 1981 §701.13(c), that (1) the sentence was not imposed under the influence of passion, prejudice, or any arbitrary factor; (2) the evidence supported the aggravating circumstances found; and (3) the sentence was not disproportionate or excessive to the penalty imposed in similar cases, considering both the crime and the defendant.

Evidence at Trial

On the morning of June 13, 1980, John Swinford discovered the bodies of Julie Shelia Lovejoy, Averil Bourque, and Robert Leon Swinford at the victims' home near Velma, Oklahoma. (Tr. p. 372-375) Ms. Bourque and Robert Swinford, who were living together as boyfriend and girlfriend, were found in the same bedroom. (Id). Ms. Lovejoy, a house-mate, was found in another bedroom. (Id). The home was in a desheveled state when the bodies were found. (Tr. 370-371) The victims died from wounds caused by .22 caliber and .380 caliber shells./3 With the exception of a wound to Ms. Bourque's chest, the evidence of powder burns indicated all were shot individually at short range. (Tr. p. 567; 571; 578; 579; 593). According to one witness, the appellant indicated all of the victims were individually shot. (635-640). No medical testimony was presented regarding the pain or suffering of any of the victims.

3/ Mr. Swinford died from two gunshot wounds in the back. Ms. Bourque was shot four times, once in the chest, once in the right ear, and twice in the forehead. Ms. Lovejoy died from a single gunshot wound to the face. Ballistic reports showed that all of the wounds except those to Ms. Bourque's forehead, were inflicted with a .380 caliber shell. (Tr. pp. 1014-15)

Jewelry estimated at $6,000 to $8,000 was found in a purse at Ms. Bourque's feet. Missing from the home was Mr. Swinford's watch, and a .22 caliber pistol.

The State used various witnesses to link petitioner with the crime. Friends of petitioner testified that on June 12, 1980, petitioner consumed drugs and alcohol at his home at Hearldon, Oklahoma before leaving that afternoon with William Starr Jordan and his Jordan's girlfriend. (Tr. 418-420) When petitioner returned, he was heavily intoxicated (Tr. 420-421). He called Johnny Gillum in Wichita Falls, Texas, before passing out for several hours. (Tr. 418, 423, 428) When he awoke, Gillum, Jordan and petitioner loaded several guns into an automobile belonging to petitioner's girlfriend (Tr. 561, 608, 652, 692, 717, 736). They left. Returning around 11:00 p.m. with a suitcase, an empty purse, some jewelry, and some pictures, (Tr. 729), everyone at the house immediately packed and went to Wichita Falls, Texas. (Tr. 613).

At Wichita Falls, petitioner was alleged to have had a woman clean a spot of what appeared to be blood off his boot (Tr. 492, 515, 573), and to destroy the photographs. (Tr. 348, 512, 610, 695) The jewelry also was sold. One witness reported that petitioner and Gillum disposed of a .380 caliber pistol in Lake Arrowhead, which was later recovered by police./4 (Tr. 616)

One witness testified that petitioner told her of shooting the people in Velma, and that one of the women had a gun. (Tr. 635-640) Two other witnesses testified petitioner told them he had participated in a robbery/murder of three persons.

Another witness stated that petitioner was aware that Ms. Bourque possessed valuable jewelry. (Tr. 457, 458, 497).

4/ A second pistol, a .22 caliber, was reportedly disposed of by William Star Jordan. It too was later recovered by police.

Sentencing Phase

At sentencing phase, the prosecutor successfully moved for incorporation into the second stage of all first stage evidence, and introduced a judgment and sentence showing a prior conviction of the petitioner for robbery with firearms (Tr. 1196).

The State called no witnesses, nor did the defense. (Tr. 1196-1197) No mitigating evidence was presented and defense counsel's argument consisted of six pages of transcript. (Tr. 1206-1212)

HOW THE FEDERAL QUESTIONS WERE DECIDED BELOW

The Oklahoma Court of Criminal Appeals is required by statute to determine whether a sentence of death is arbitrarily imposed, and whether the evidence supports the jury's finding of any statutory aggravating circumstances. 21 O.S. 1981 §701.13(c)(1)(2).

That Court has already affirmed the constitutionality of both the aggravating circumstances in question. Odum v. State, 651 P.2d 703 (Okl.Cr. 1982); Burrows v. State, 640 P.2d 533 (Okl.Cr. 1982).

REASONS FOR GRANTING THE WRIT

I. THE STATUTORY AGGRAVATING CIRCUMSTANCES THAT THE MURDERS WERE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL", AND THAT PETITIONER "KNOWINGLY CREATED GREAT RISK OF DEATH TO MORE THAN ONE PERSON" DO NOT CONTROL ARBITRARINESS IN THE EXERCISE OF CAPITAL SENTENCING DISCRETION.

Title 21 O.S. 1981 §701.12, lists two aggravating circumstances pertinent to this case that are unconstitutional---that "the defendant knowingly created a great risk of death to more than one person" (21 O.S. 1981 §701.12(2) and that "the murder was especially heinous, atrocious and cruel." (21 O.S. 1981 §701.12(4). These provisions, as interpreted by the Oklahoma Court of Criminal Appeals, are unconstitutional as they do not confine, regularize, or channel capital sentencing discretion. When an aggravating circumstances is not utilized and interpreted in a limiting and consistent manner, it is unconstitutional. Proffitt v. Florida, 428 U.S. 242, 253 (1976) (Opinion of Stewart, Powell and Stevens, J.J.); Gregg v. Georgia, 428 U.S. 153, 158 (1976); Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (Opinion of Stewart, Powell and Stevens, J.J.). Both of these aggravating circumstances were found in petitioner's case, and the writ should be granted to vacate the death penalty./5

5/ The use of an overbroad or vague aggravating circumstance is particularly troublesome in Oklahoma. This is because Oklahoma law states only the statutory circumstances can be used in aggravation, 21 O.S. 1981 §701.10, and because the improper use of a statutory aggravating circumstance results in modification of a sentence to life imprisonment. Johnson v. State, 665 P.2d 815, on reh. 655 P.2d 826 (Okl.Cr. 1983)

The Court of Criminal Appeals use of the aggravating circumstance that the murder was especially heinous, atrocious and cruel is overbroad and inconsistent.

This Court has already expressed some displeasure with the way Oklahoma has interpreted this aggravating circumstance. In Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court noted that the trial judge had found the aggravating circumstance of heinous, atrocious and cruel because the crime was designed to inflict a high degree of pain and utter indifference to the rights of a police officer. Id. at 108, n. 3. The Court observed:

> "We understand the Court of Criminal Appeals to hold that the murder of a police officer in the performance of his duties is 'heinous, atrocious or cruel' under the Oklahoma statute...However, we doubt the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in Godfrey v. Georgia, 446 U.S. 420 (1980)."

Id. at 109, n. 4. In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court concluded that Georgia was interpreting a similar aggravating circumstance in such a broad way that the Eighth and Fourteenth Amendments to the United States Constitution were being violated. The Oklahoma cases provide such little guidance that there is no assurance that the death penalty will not be imposed in an arbitrary and capricious manner, thereby creating a death penalty scheme not unlike that condemned in Furman v. Georgia, 408 U.S. 238 (1972).

The Oklahoma court has, at times, indicated that the heinous-atrocious-cruel circumstance applies only when the facts approached torture or mental suffering. Smith v. State, 659 P.2d 330 (Okl.Cr. 1983), reversed on other grounds __ U.S. ___, 104 S.Ct. 324 (1983) (victim beaten into helplessness and put in the back of a pickup truck. Died of smoke inhalation after co-defendant set truck on fire). Ake v. State, 663 P.2d 1 (Okl.Cr. 1983) ___U.S. ___, cert. granted,

(1984) (bound victims, discussed killing family, and ignored plea for mercy before shooting victims). Odum v. State, 651 P.2d 703 (Okl.Cr. 1982) (when victim shot once in neck and died within ten minutes of asphyxiation there was no evidence of any physical or mental suffering whatsoever and the manner of killing cannot said to lie at the 'core' of the statutory aggravating circumstance)".

However other cases from Oklahoma display a pattern of such broad interpretation of this particular aggravating circumstance that the infliction of the death penalty based on the heinous-atrocious-cruel circumstance is arbitrary and capricious. In Hays v. State, 617 P.2d 223 (Okl.Cr. 1980), the defendant shot a person twice and the Oklahoma Court of Criminal Appeals, without eluding to any great suffering or unusually pitiless action, determined that the circumstance supported the finding of the heinous-atrocious-cruel aggravating circumstance. See also Irvin v. State, 617 P.2d 588, 598 (Okl.Cr. 1980) (unnecessary to prove the homicide was pitiless or tortuous to the victim.) In Eddings v. State, 616 P.2d 1159, 1168 (Okl.Cr. 1981), rev. on other grounds 455 U.S. 104 (1982), noted above, the Oklahoma Court appeared to rely on the fact the victim of the gunshot blast was a police officer in its determination that the evidence supported the heinous-atrocious-cruel circumstance. In Boutwell v. State, 659 P.2d 322 (Okl.Cr. 1983), the Oklahoma Court said that the heinous-atrocious-cruel aggravating circumstance was supported because the robbers planned in advance to murder the victim, and because the defendant and the victim knew one another. In Burrows v. State, 640 P.2d 533, 543 (Okl.Cr. 1982), the Oklahoma Court found support for the heinous-atrocious-cruel aggravating circumstance because the pregnant woman was shot four times, did not linger for a long time, but had time to

know that the life she carried also would die. In Davis v. State, 665 P.2d 1186 (Okl.Cr. 1983, the support for this aggravating circumstance was that it was a mass murder (two killed) involving multiple gunshot wounds to the victim. And finally, in Stafford v. State, 669 P.2d 285, 299 (Okl.Cr. 1983), the court reasoned that the "unprovoked murders committed upon a family who had taken time as they made their way to the funeral of a loved to stop and help a fellow citizen" supported this aggravating circumstance.

Although the shooting of a person is a detestable act, there is nothing about shooting which makes a murder so unusual as to be atrocious as compared with other homicides. The aggravating circumstance being discussed here, and the death penalty in general, should be reserved only for those types of homcide which are significantly more outrageous than others. See e.g., Godfrey v. Georgia, supra. Appellant respectfully contends that the heinous-atrocious-cruel circumstance is being arbitrarily applied here and in other Oklahoma casess, see Furman v. Georgia, supra, and this Court should grant certiorari to resolve this issue.

The Court of Criminal Appeals' use of the aggravating circumstance that the defendant knowing created great risk of death to more than one person is overbroad and inconsistent.

The use of this aggravating circumstance, where each of the victims were killed by the distinct act of shooting each victim individually at short range, shows Oklahoma's interpretation of this aggravating circumstance lacks particularized guidance to insure controlled and reasoned jury discretion. Proffitt, supra; Jurek v. Texas, 429 U.S. 262 (1976); Gregg v. Georgia, supra.

Initially, it is necessary to note that other states with the same or similar aggravating circumstance have used it in a narrowly channeled sense. Georgia has a similar aggravating circumstance: knowingly creating "a risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to more than one person." Georgia Code §27-2534.1(b)(5)(1977). Although the above phrase is more specific and precise than Oklahoma's, it was challenged in Gregg v. Georgia, supra, as being vague, overbroad, and subject to widely different interpretations, thereby creating a substantial risk that the death penalty would be arbitrarily imposed by the jury. This Court in Gregg, admitted the phrase was "susceptible of an overbroad interpretation." However, the court stopped short of striking the circumstance because it approved with the construction given if in Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975). Chenault involved a defendant who stood up during Sunday morning church service and shot and killed the organist and another person, before randomly opening fire on the entire congregation. However, the Georgia Supreme Court later interpreted this aggravating circumstance to apply where several persons are present and the defendant uses the weapon, which by its nature threatens the lives of others than the

intended vicitm. See Jones v. State, 234 Ga. 820, 256 S.E.2d 907 (1974).

The state of Louisiana has an almost identical aggravating circumstance involving the "risk of death or great bodily harm to more than one person". La. Code Crim. Proc. Anot. art. 905.4(d)(West Supp. 1978).

In the case of State v. English, 367 S.2d 815 (La. 1978), this aggravating circumstance was one of four found by the jury. The Louisiana Supreme Court found that the "risk of death" circumstance did not apply to facts where the defendant intended to commit each murder by a distinct act of shooting each victim individually at short range. In English, the defendant had abducted the victim and the victim's companions. The Louisiana Supreme Court recognized the legislative intent might have contemplated acts which kill and create the risk at the same time, such as arson or firing into a crowd. The broadest construction considered was where a single course of conduct "contemplates and causes" the knowing creation of a great risk of death, such as the abduction here. Id. at 823-24.

The English case indicated it was doubtful the aggravating circumstance was proven in that case and clearly indicated that the risk must be contemplated and created at the outset of a "single course of conduct", such as the abduction or the random firing into a crowd, and does not exist at the time of a distinct, individual close-range shooting. Therefore, even the broadest construction contemplated in English is distinquishable from a case where there are separate, distinct shootings.

In the recent case of Francois v. State, 407 S.2d 885, 891 (Fla. 1982), the Florida Supreme Court refused to find the circumstance existed where defendant entered a victim's house

to rob him and, in the course of the episode, killed the victim and five of his house guests who arrived in the interim. The court called the trial judge's conclusion that the others who approached the house would have been endangered "pure speculation", citing White v. State, 403 S.2d 331 (Fla. App. 1981). Id. at 891. In Lucas v. State, 376 S.2d 1149, 1153 (Fla. 1979), the court found the circumstance to exist because the defendant engaged in a "raging gun battle" to kill the victim with two others present.

Oklahoma, on the other hand, has again shown its desire to apply an aggravating circumstance in a broad and inconsistent pattern. Oklahoma has held that a person does not create a risk of death to one he holds in his arms while he is shooting at a third person, according to one of three separate opinions in an Oklahoma death penalty case. Burrows v. State, 640 P.2d 553 (Okl.Cr. 1982) (Cornish, J. concurring in part and dissenting in part). Although Judge Cornish's decision that the evidence did not support the aggravating circumstance was not explained in detail, the inference was that a risk of death cannot be created to a person who is not in the line of fire. The Oklahoma decision that comes closest to being factually within the plain meaning of §701.12(2) is Jones v. State, 648 P.2d 1251, 1259-60 (Okl.Cr. 1982). There the defendant irrationally and for no apparent reason opened fire on several people in the same area of a public bar.

However, other cases have not been so clear and finding of this circumstance has been questioned by commentators. E.g., Hays v. State, 617 P.2d 223, 231-32 (Okl.Cr. 1980) and Note, Criminal Procedure: Creating Great Risk of Death to More than One Person as an Aggravating Circumstance, 34 Okl. L. Rev. 325,335-336 (1981). In Hays, the court found this circumstance

where there was only one victim. Apparently, the court felt that Hays' subsequent pointing of a weapon at a carload of teenagers, at a time removed from the killing, supported the jury finding of this circumstance, although the Court of Criminal Appeals gave no rationale for its decision. In Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980), sentence vacated on other grounds, ___F.2d ___ (10th Cir. 1984), the Court found, without more, that the defendant created a great risk of death to more than one person in that "he did in fact kill without authority of law two persons..." Id. at 282 n. 1. The implication here is the fact that more than one person died meets this aggravating circumstance.

This implication is now, apparently, the law in Oklahoma. In Stafford v. State, supra, the court found this aggravating circumstance. The court noted:

> "Immediately after having shot Melvin Lorenz, the appellant open fired on Linda, and then stalked his third victim, young Richard Lorenz, as he crying in the darkness [for his mother and father]. These facts amply support the aggravating circumstance that the appellant created a risk of death to more than one person."

And, in the instant case, the court found:

> "It is apparent from the facts of the case that the three murders created a risk of death to more than one person as the three victims resided in the same house and were all present when the appellant and his two co-defendants appeared to rob them. The jury's finding in this regard is adequately supported." Robison v. State, Slip Op. p. 10.

Of course, this interpretation totally ignores the word "risk". Every victim faces an overwhelming risk of death immediately prior to death. If the risk of death is created at the moment a homicidal impulse arises, where is the line to be drawn to include those who are endangered by the risk? Must the risk be created with the same fatal act? Does it include

only people in the line of fire, the same room or area, or house, or even the same neighborhood? Risk has been defined as "the possibility of suffering harm or loss; danger...a factor, element or course involving uncertain danger, hazzard. The American Heritage Dictionary of the English Language, 1121 (1965). Because Oklahoma has interpreted this aggravating circumstance in a broad and inconsistent manner in this and other cases, a writ of certiorari should issue to vacate the death sentence.

II. IMPOSITION OF THE DEATH PENALTY AGAINST PETITIONER IS IMPERMISSIBLE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO UNITED STATES CONSTITUTION BECAUSE IT INVOLVES MULTIPLE PUNISHMENTS BASED ON ONE SET OF FACTS.

Although three people died as a result of the episode which is the subject of petitioner's convictions, the evidence does not constitutionally support the aggravating circumstance of creating a great risk of death to more than one person. It was impermissible to use the fact that Averil Bourque and Shelia Lovejoy died to justify a death penalty for the killing of Robert Swinford, when, at the same time, the prosecution used fact that Ms. Lovejoy and Mr. Swinford died to justify a death penalty for the killing of Ms. Bourque. This cross-utilization of the fact of three deaths is contrary to the double jeopardy principles set forth in the Fifth Amendment to the United States Constitution made applicable to the states through the Fourteenth Amendment.

Federal constitutional double jeopardy principles do not permit either multiple convictions or multiple punishments based on one set of facts. Whalen v. United States, 445 U.S. 685 (1980); Harris v. Oklahoma, 433 U.S. 682 (1977). It is clear that a great risk of death to more than one person did not occur three times in petitioner's case. Yet the

aggravating circumstance of creating a risk of death to more than one person has been found to exist three times in the instant case. Thus petitioner has been convicted and punished three times for the same conduct.

One of three separate opinions in Burrows v. State, supra, notes that a person cannot create a risk of death to a person whom he holds in his arms while shooting a third person. As noted above, Judge Cornish's decision that the evidence did not support the aggravating circumstance was not explained in detail, although it is apparent from the context that the determination was made that a risk of death could not be created to a person who was not in the line of fire. Of course, in petitioner's case, the evidence did not support a conclusion that any of the three victims were in the line of fire when the other were shot.

Thus under the Fifth and Fourteenth Amendments to the United States Constitution, the death penalty of petitioner was improper, and this Court should grant certiorari to consider this issue.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Dated: April 13, 1984

Respectfully submitted,

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COUNSEL OF RECORD
(Petition for Writ of Certiorari Only)

APPENDIX A

Opinion of the Court of Criminal Appeals

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

OLAN RANDLE ROBISON,
Appellant,
-vs-
THE STATE OF OKLAHOMA,
Appellee.

FOR PUBLICATION

Case No. P-81-388

OPINION

BRETT, Judge:

Olan Randle Robison, appellant, was convicted of three counts of Murder in the First Degree in Stephens County District Court Case No. CRF-80-165. In accordance with 21 O.S.Supp. 1976, § 701.11, the jury fixed punishment at death by lethal injection, in all three counts.

Appellant was convicted for the deaths of Julie Sheila Lovejoy, Averil Bourque, and Robert Leon Swinford, all of whom shared a house on the outskirts of Velma, Oklahoma. A robbery apparently precipitated their deaths, which was evidenced by the disheveled state of their home when their bodies were discovered the morning of June 12, 1980. The victims died from wounds inflicted by a .22 caliber pistol and a .380 caliber pistol.

The state presented a number of witnesses at trial who implicated appellant and two other men, Johnny Gillum and William Starr Jordan, in the murders. One of the witnesses, Sharon Briscoe, was appellant's girlfriend and it was her apartment in Healdton, Oklahoma, where several persons, including appellant, had gathered on June 11, 1980, to discuss a future amphetamine laboratory. Throughout the day appellant consumed drugs and alcohol until he finally passed out in the early evening, but not until after he had called Johnny Gillum in Wichita Falls, Texas, requesting that Gillum come to Healdton because he was needed. When Gillum arrived and successfully awakened appellant, the two of them and William Starr Jordan took several guns from the apartment and loaded them in Sharon Briscoe's car. Appellant stated that he was going to "get some gold" or "get rich" and the three men left.

After returning sometime before 11:00 p.m. with a suitcase and an empty brown purse, appellant gave one of the women in the apartment a lady's watch, a man's watch, and a pocket knife. He then had her clean his boot, which contained a spot that looked like blood. Appellant also removed his blood-stained shirt. Upon appellant's orders, everyone packed and left that night for Wichita Falls, Texas.

Patricia Brumfield was with appellant and Johnny Gillum later that night when they travelled to Lake Arrowhead where suitcases and a gun were tossed into the water. The gun, a .380 caliber pistol was later recovered. At trial, Ms. Brumfield testified that appellant told her of shooting the people in Velma; that one of the women was naked and had a gun. He also told her that they did not find the gold they had gone after. Appellant requested that Ms. Brumfield retrieve a .22 pistol from William Jordan, but she discovered that Jordan had disposed of it.

Two other witnesses for the State also testified of being told by appellant that he had participated in murdering three people during a robbery.

When the crime scene was processed, jewelry was discovered in a purse beneath Averil Bourque's body on her bed. A jeweler estimated the value to be between $6,000 and $8,000. It was revealed at trial that appellant was aware that Ms. Bourque possessed valuable jewelry. Among possessions discovered missing from the house following the murders was Robert Swinford's watch, and a .22 caliber pistol.

I.

Appellant initially contends that the trial court erred in denying his motion for change of venue. He attempted to support this contention prior to trial through the affidavits of three residents in Stephens County who verified that appellant could not receive a fair trial in that County because of the extensive pretrial news coverage of the triple slayings which prejudiced the citizens of that county against appellant and thereby rendered it impossible to empanel a jury which did not have a fixed opinion concerning his guilt.

The applicable rule to this issue is stated in Hammons v. State, 560 P.2d 1024 (Okl.Cr.1977), as follows:

> When considering a motion for a change of venue, the presumption of law is that a defendant can get a fair and impartial trial in the county in which the offense charged was committed. The presumption is rebutable, but the burden of persuasion is upon the defendant. Fry v. State, 91 Okl.Cr. 326, 218 P.2d 643 (1950). A mere showing that pretrial publicity was adverse to the defendant is not enough. Shapard v. State, Okl.Cr., 437 P.2d 565 (1967). The defendant must show by clear and convincing evidence that jurors were specifically exposed to the publicity and that he was thereby prejudiced. Tomlinson v. State, Okl.Cr., 554 P.2d 798 (1976). The granting of a change of venue is a discretionary matter within the powers of the trial court and unless it is clear from the record that the trial court has abused its discretion, or committed error in judgment, this Court will not overrule the trial court, especially where there has been an extensive voir dire examination to determine the prejudicial effect of the pretrial publicity. Shapard v. State, supra.

While it is true that appellant sought to rebut the presumption in favor of his receiving a fair and impartial trial in Stephens County through the affidavits and testimony of the three affiants, we are compelled to agree with the trial judge that he did not meet success.

The newspaper accounts of the homicides do not appear to be adverse to appellant, although they relate the fact that he was charged with the crimes and give some background information about him. The jurors each truthfully conveyed that they had been exposed to publicity concerning the crime through the news media, but through voir dire it was established that their prior knowledge would not act to prejudice them. They each indicated they could render a fair judgment on the evidence presented in court aside from information they may have obtained outside of court. Thus, no abuse of discretion was shown by the trial court's denial of change of venue.

II.

Appellant urges reversal of his conviction because of comments made by the prosecutor that amounted to comments on appellant's right to remain silent. The initial incident assigned as error occurred during voir dire when the prosecutor questioned a prospective juror concerning the consideration he would give to

defendant's bias, interest, and credibility should he testify. The law in this area is that it is error for the prosecutor to comment at any stage of the jury trial upon the defendant's right to remain silent. Hanf v. State, 560 P.2d 207 (Okl.Cr.1977).

When a similar situation arose in Stover v. State, 617 P.2d 898 (Okl.Cr.1980), this Court reversed the conviction. The reversal was predicated on the prosecutor's comments followed by defense counsel's timely objection and motion for mistrial. Defense counsel did not object to the comments in the present case, which is mandatory for preservation of the error; thus, there is no basis for review of this alleged error other than to review it for fundamental error. Having found none, this allegation provides no grounds for reversal.

Appellant also complains of statements made during closing argument, which he alleges were comments on his failure to take the stand in contravention of 22 O.S.1981, § 701. We have read the closing argument and are of the opinion that the comments were no more than reasonable comments on reasonable interpretations of the evidence. See Cobbs v. State, 629 P.2d 358 (Okl.Cr.1981). Only when taken out of context, as appellant has done, do the remarks appear to be emphasizing appellant's failure to testify. Furthermore, no objections were entered when the remarks were made and any error which could have occurred was waived.

III.

Appellant's third argument urges reversal because of the tainted in-court identification of appellant by Terry Henderson who had undergone hypnosis prior to identifying him. Ms. Henderson had been travelling past the murder victims' home the night of the murders when a car containing at least two occupants was backing out of the driveway. After hearing of the murders, she contacted the sheriff's office and gave a description of the car and one of the occupants.

During the investigation of the murders, Ms. Henderson underwent hypnosis. At trial appellant sought to have her testimony excluded, but was unsuccessful. When the witness

testified, she positively identified appellant as the man she saw in the car.

This Court has not deviated from the rule pronounced in Jones v. State, 542 P.2d 1316 (Okl.Cr.1975), that statements made in a hypnotic state are inadmissible "when offered for establishing the truth of the statements." But the issue in the present case is not resolved by that rule. The issue at hand is whether a witness may make an in-court identification following hypnosis when no identification had been made prior to the hypnosis. We think not.

Through our research, we have discovered that the Arizona Supreme Court shares the same view on hypnosis as we have come to hold. The Arizona Court held inadmissible testimony given by a witness who had been hypnotized with regard to the subject on which he was to testify. Testimony by a witness who had been hypnotized was held inadmissible from the time of hypnosis forward in State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981). The court reasoned:

> It is generally agreed that hypnosis is a state of altered consciousness and heightened suggestibility in which the subject is prone to experience distortions of reality, false memories, fantasies and confabulation (the "filling in of memory gaps with false memories or inaccurate bits of information"). In the context of pretrial interrogation under hypnosis, these distortions, delusions and confabulations are apparently aggravated by the tendency of a subject to respond in a way he believes is desirable to the hypnotist. This may happen even without any intent or awareness on the part of the hypnotist or the subject.
>
> In addition, a person may assimilate the distortions, delusions and confabulations he develops under hypnosis as part of his own memory. After the hypnotic session has ended, the subject would then perceive those hypnotically induced impressions to be reflections of his actual past observations.
>
> * * *
>
> The determination of the guilt or innocence of an accused should not depend on the unknown consequences of a procedure concededly used for the purpose of changing in some way a witness' memory. Therefore, until hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion or fantasy, we feel that testimony of witnesses which has been tainted by hypnosis should be excluded in criminal cases.

> We realize that it will often be difficult to determine whether proffered testimony has been produced by hypnosis or has come from the witness' own memory, unaffected by hypnotic suggestion. In order to ensure against the dangers of hypnosis, therefore, this Court will consider testimony from witnesses who have been questioned under hypnosis regarding the subject of their offered testimony to be inadmissible in criminal trials from the time of the hypnotic session forward.

We adopt the holding of the Arizona court in the case at hand with regard to the subject matter of Ms. Henderson's testimony from the point of hypnosis forward, which includes her in court identification of appellant. The identification was inadmissible and the trial court erred in permitting it to be made. Nevertheless, this error is not grave enough to predicate reversal of the conviction. The evidence apart from Ms. Henderson's identification is far too overwhelming for us to conclude that her identification determined the verdict.

IV.

Appellant argues in his Fourth assignment of error that evidence regarding appellant's character and prior offenses was improperly admitted at trial and resulted in prejudice to him. The alleged improper evidence was introduced through the testimony of Sharon Briscoe, a witness for the State, who in one instance remarked that appellant was one of several people gathered at her apartment the day of the murders to plan the erection of an amphetamine laboratory. Although not objected to, and therefore not preserved for appellate review, we nevertheless find that the witness' explanation was relevant and therefore properly admissible. Relevant evidence is evidence that has any tendency to make more or less probable a material fact in issue. President v. State, 602 P.2d 222 (Okl.Cr.1979).

Testimony given at trial revealed that money was needed to set up the amphetamine laboratory, and the apparent motive behind the murders was robbery. We find that the evidence of the amphetamine laboratory was explanatory of the motive for the commission of the murders. The fact that the evidence of the lab reflected in some part on appellants character is outweighed by the

probative value of disclosing the motive of robbery for committing the murders.

In another statement Ms. Briscoe explained that she slept with appellant, and he complains that this was an improper comment on his character. It has long been the rule that the State may not attack the defendant's character unless the defendant puts his character in issue by introducing evidence of good character. Doser v. State, 88 Okl.Cr. 299, 203 P.2d 451 (1949). Although there are certain times where such a remark would be improper, we do not think Ms. Briscoe's comment in the context in which it was made can be construed as an attack on appellant's character.

During Ms. Briscoe's testimony, it also surfaced that appellant had a prior record, was on probation for an unspecified offense, and at the time of the murders had an upcoming court appearance. Appellant's trial counsel diligently objected to such testimony when it was offered, the objections were sustained, and the jury was admonished not to consider it.

We note that the remarks were not elicited by the prosecutor. Moreover, even though they were improper, as they could be construed as offered to prove the character of appellant in order to show he acted in conformity therewith, we do not believe that the evidence in any way affected the verdict. In the instant case, the court's admonishment to the jury cured any error. Kitchen v. State, 513 P.2d 1300 (Okl.Cr.1973).

V.

Appellant filed a motion for new trial based on newly discovered evidence which he claims was erroneously overruled by the trial court. Whether or not a motion for new trial based on newly discovered evidence is granted is largely within the discretion of the trial judge. Garcia v. State, 545 P.2d 1295 (Okl.Cr.1976). Marlow v. City of Tulsa, 564 P.2d 243 (Okl.Cr.1977), enunciates the following guidelines for determining whether a trial court abused its discretion in overruling a motion for new trial: 1) Is the evidence material? 2) Did the accused or his counsel exercise due diligence to discover the evidence before the trial? 3) Is it cumulative? 4) Is there a reasonable probability that if the newly discovered evidence had been

introduced at the trial it would have changed the results. Id. at 245.

In the present case, appellant secured an affidavit from codefendant, Johnny Gillum. Gillum stated that appellant was aleep in the backseat of Sharon Briscoe's car when the murders occurred and had no knowledge of them until the crimes had been carried out. He further stated that the man seen and identified by Terry Henderson was not appellant, but William Starr Jordan.

Gillum's trial was held several days after appellant's; he was found guilty and sentenced to life imprisonment. Appellant argues that had Gillum been called to testify in appellant's trial prior to his own, he would have refused to incriminate himself through his testimony.

It is our opinion that the trial court did not err when it overruled the motion for new trial. The facts of this case indicating appellant's guilt are so strong that there is no reasonable probability that the jury's verdict would change if the new evidence were introduced. Testimony from at least five witnesses implicated appellant in the murders through conversations they had with him or overheard, and observations they made both before and after the murders occurred. Under these circumstances we find no abuse of discretion on the part of the trial court in overruling appellant's motion for new trial.

VI.

Appellant submits that the prosecutor went beyond the scope of evidence during closing arguments in both stages of the trial to arouse passions and prejudices of the jurors and also expressed his personal opinion of appellant's guilt. Our review of the closing arguments reveals that the appellant's claims are for the most part unfounded. Prosecutors are entitled to make reasonable comments on the interpretations of the evidence See Cobbs v. State, 629 P.2d 368 (Okl.Cr.1981). When the prosecutor stated that he represented the victims, the one instance where we agree that the prosecutor deviated from the above-stated rule, the defense counsel failed to object. Had he objected our conclusion would be no different, however, as the comment made was improper but could not have affected the verdict. Accordingly, appellant

was not denied a fair and impartial trial by the remarks of the prosecutor and reversal or modification is not justified.

VII.

Five of the photographs of the victims introduced by the State at trial are claimed by appellant to be gruesome and admitted into evidence solely to arouse the passions and prejudice of the jury. The photographs depict the victims as they were found at the crime scene and the facial view of one victim at the autopsy. The general rule as to admissibility of photographs is that they are admissible when they are relevant to issues before the court and when their probative value is not outweighed by danger of prejudice to the accused. Vierrether v. State, 583 P.2d 1112 (Okl.Cr.1978).

The probative value of photographs of murder victims can be manifested numerous ways including showing the nature, extent, and location of wounds, Glidewell v. State, 626 P.2d 1351 (Okl.Cr.1981), depicting the crime scene, Deason v. State, 576 P.2d 778 (Okl.Cr.1978), and corroborating the medical examiner's testimony. Bills v. State, 585 P.2d 1366 (Okl.Cr.1978). The probative value of the photographs in the instant case is derived from each of the elements of the cited cases. Thus, the photographs possess probative value, which is not outweighed by prejudice to appellant.

VIII.

One of the State's photographic exhibits depicted an O.S.B.I. agent holding a string stretched to a hole in the wall in order to illustrate the trajectory of a bullet in relation to the dead body of Averil Bourque. Appellant claims that such a posed photograph was inadmissible at trial under the rule that posed photographs showing various assumed positions intended only to illustrate a hypothetical situation are inadmissible as evidence. The rationale of the rule forbidding admission of such photographs is to guard against "stage setting" for the purpose of re-enacting the crime as the State theorizes it happened. Roberts v. State, 82 Okl.Cr. 75, 166 P.2d 111 (1946).

Although it is our opinion that the photograph should not have been admitted into evidence because its purpose was no more than to show the State's theory of what happened in Averil Bourque's bedroom the night of the murder, we do not find the photograph to be nearly as offensive as the one admitted in Roberts. There being no apparent prejudicial effect that could have arisen from admission of the photograph into evidence, we find no basis on which to grant relief.

IX.

Title 21 O.S.1981, § 701.13(C) requires this Court to make three determinations in addition to consideration of appellant's assigned errors. The first determination is whether the death penalty was imposed under the influence of passion, prejudice, or any other arbitrary factor. We have carefully reviewed the transcript in this regard and find it devoid of prejudice or bias. And, while it is true that the victims resided in a small community where there may be strong feeling concerning a crime such as this, we are confident that the penalty imposed was not influenced by passion, prejudice, or any other arbitrary factor.

Second, a determination must be made on whether the evidence supports the jury's findings of statutory aggravating circumstances. The following aggravating circumstances were found by the jury: (1) the defendant knowingly created a great risk of death to more than one person; (2) the defendant had previously been convicted of a felony involving the use or threat of violence to the person; and (3) the existence of a probability that the defendant would commit criminal acts of violence that would consitute a continuing threat to society. Additionally, a fourth aggravating circumstance, the murder was heinous, atrocious, or cruel, was found to exist in the case of Averil Bourque.

It is apparent from the facts of the case that the three murders created a risk of death to more than one person as the three victims resided in the same house and were all present when appellant and his two codefendants arrived to rob them. The jury's finding in this regard is adequately supported.

During the second stage of the trial, the State admitted a certified judgment and sentence of appellant's 1973 conviction for armed robbery. This particular conviction supports the jury's finding that appellant had previously been convicted of a felony involving the use or threat of violence to the person. Furthermore, the calloused manner in which the crimes were committed supports the finding that there is a probability that appellant would commit future acts of violence which would be a continuing threat to society.

Averil Bourque's death was the result of multiple gunshot wounds. She was shot once in the left breast, once in the right ear, and twice between the eyes. The wounds in the ear and between the eyes were at close range as evidenced by powder burns surrounding the wounds. A death occurring at close range by two gunshots between the eyes amply supports a finding that the death occurred in a heinous, atrocious or cruel manner.

Finally, after considering whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, which is the third determination that this Court must make, we conclude that it is not. The death penalty was upheld in Stafford v. State, 669 P.2d 285 (Okl.Cr.1983), Stafford v. State, 665 P.2d 1205 (Okl.Cr.1983), and Hays v. State, 617 P.2d 223 (Okl.Cr.1980), which are all cases where the victims of robberies were shot and killed as occurred in the instant case. Furthermore, the factors which existed in the cases where this Court has either modified the death sentence to life[1] or reversed the conviction[2] are not present in the case at hand. Thus, we find that the assessed death penalty is neither excessive nor disproportionate.

For the reasons hereinstated, the judgment and sentence appealed from should be, and the same is hereby, AFFIRMED.

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[1]Jones v. State, 660 P.2d 634 (Okl.Cr.1983); Driskell v. State, 659 P.2d 343 (Okl.Cr.1983); Boutwell v. State, 659 P.2d 322 (Okl.Cr.1983); Munn v. State, 658 P.2d 482 (Okl.Cr.1983); Odum v. State, 651 P.2d 703 (Okl.Cr.1983); Burrows v. State, 640 P.d 533 (Okl.Cr.1982); Franks v. State, 636 P.2d 361 (Okl.Cr.1981); Irwin v. State, 617 P.2d 588 (Okl.Cr.1980)

[2]Coleman v. State, 670 P.2d 596 (Okl.Cr.1983); Hall v. State, 650 P.2d 893 (Okl.Cr.1982); Brewer v. State, 650 P.2d 54 (Okl.Cr.1982); Hager v. State, 612 P.2d 1369 (Okl.Cr.1980).

AN APPEAL FROM THE DISTRICT COURT OF STEPHENS COUNTY, OKLAHOMA
THE HONORABLE GEORGE W. LINDLEY, DISTRICT JUDGE

OLAN RANDLE ROBISON, appellant, was convicted of three counts of Murder in the First Degree, in Stephens County District Court, Case No. CRF-80-165. He was sentenced to death and appeals. AFFIRMED.

HEGEL BRANCH, JR.
DUNCAN, OKLAHOMA
Attorney for Appellant

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA
SUSAN TALBOT
ASSISTANT ATTORNEY GENERAL
OKLAHOMA CITY, OKLAHOMA
Attorneys for Appellee

OPINION BY BRETT, J.,
BUSSEY, P.J., SPECIALLY CONCURS
CORNISH, J., CONCURS

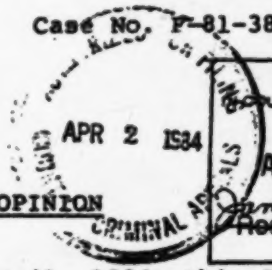
BUSSEY, PRESIDING JUDGE, SPECIALLY CONCURRING:

I agree that the judgment and sentence should be affirmed and that the record is free from any error which would justify reversal or modification. The aggravating circumstances amply support the imposition of the death penalty. I do not, however, agree that the in-court identification of the defendant by witness Henderson was so tainted, as to render it inadmissible for I am of the opinion that the identification was based on her observations of the defendant at the crime scene. In this regard her testimony was merely cumulative of that established by other evidence.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

OLAN RANDLE ROBISON,)
)
Appellant,)
)
-vs-) Case No. F-81-388
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

NOT FOR PUBLICATION



ORDER CORRECTING OPINION

NOW, on this 2nd day of April, 1984, this Court finds that an error appears in the Opinion in the above styled and numbered case delivered by this Court on the 13th day of January, 1984.

IT IS THEREFORE THE ORDER OF THIS COURT, that pages 5 and 6 of the existing opinion be removed and the attached pages 5 and 6 be inserted.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT, this the 2nd day of April, 1984.

HEF J. BUSSEY, Presiding Judge

TOM BRETT, Judge

ATTEST:

Susan Hampton, Deputy
Clerk

APPENDIX B

Order Extending Time Within Which To File Petition for Writ of Certiorari

Supreme Court of the United States

No. A-717

OLAN RANDLE ROBISON,

Petitioner,

v.

OKLAHOMA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Apirl 12, 19 84.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 8th day of March, 19 84.

83-6589

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

OLAN RANDLE ROBISON, Petitioner

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, OLAN RANDLE ROBISON, moves that the Court grant leave for him to proceed in forma pauperis. As grounds for this Motion, the Petitioner would state that he is currently confined in a penal institution and is unable to pay the fees and costs associated with seeking review of this Court. The factual grounds for this Motion are further detailed in the Affidavit of the Petitioner filed herewith.

For the reasons stated, the Petitioner requests that this Motion be granted.

Respectfully submitted,

MARY BANE
Oyler & Bane
217 S. Harvey
Investors Capitol Bldg.
Oklahoma City, Oklahoma 73102
(405)

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

OLAN RANDLE ROBISON,	)
	)
Petitioner,	)
	)
v.	)
	)
STATE OF OKLAHOMA,	)
	)
Respondent.	)

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, OLAN RANDLE ROBISON, being first duly sworn, state that I am Petitioner in the above entitled case; that in support of my motion to proceed without being required to pay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I was previously granted leave to proceed without costs, on grounds of poverty, during proceedings on this case in the Oklahoma Court of Criminal Appeals.

I further swear that the responses which I have made to the questions below relating to my ability to pay the cost of prosecuting the appeal are true:

1. Are you presently employed?

Answer: No, I am presently in the custody of the Oklahoma Department of Corrections, serving the sentence for which I am petitioning the Court for review. I have been imprisoned since 1981.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other sources?

Answer: No.

3. Do you own any cash or checking or savings account?

Answer: Yes, my institutional account currently contains $ 15.00 .

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to these persons.

Answer: None.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Olan R. Robison
OLAN RANDLE ROBISON

STATE OF OKLAHOMA)
) SS:
COUNTY OF PITTSBURG)

Subscribed and sworn to before me on this 4 day of April, 1984.

Marvin Gray
Notary Public

My Commission Expires:

8-16-87

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